

89-1181

No. _____

Supreme Court, U.S.

FILED

JAN 22 1990

JOSEPH F. SPANOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,
Petitioners,

-vs.-

MONTANA DEPARTMENT OF REVENUE
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law provides that a rail carrier-employer shall file income tax information returns and other reports only with the state in which an employee resides or in which he has earned more than 50 percent of his income. 49 U.S.C. §11504. The Supreme Court of Montana has sanctioned the use of an administrative subpoena to require a rail carrier to file tax-related information reports on all of its employees, regardless of state of residence and regardless of the percentage of pay earned in Montana.

The question presented in this case is the following. Do 49 U.S.C. §11504 and the Supremacy and Commerce clauses of the United States Constitution prohibit the State of Montana from requiring a rail carrier-employer to produce pay records and tax information about employees who are residents of the State of Washington, who do not earn more than 50 percent of their income in Montana, and who do not travel more than 50 percent of their time or track miles in Montana?

PARTIES INVOLVED IN THE PROCEEDING

Burlington Northern Railroad Company Employees

Burlington Northern, Inc., and
Burlington Northern Railroad Company

Montana Department of Revenue

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OPINION BELOW

The Supreme Court of the State of Montana issued an opinion in this case which is reported at _____ Mont. _____, 781 P.2d 1121 (1989). A copy of the Montana court's opinion is included in the Appendix at A-11

JURISDICTION

The opinion of the Montana Supreme Court was entered on October 24, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional and statutory provisions are relevant to the determination of this case and are set forth in the Appendix: U.S. Const., Art. I, §8, cl. 3; U.S. Const., art. VI, cl. 2; 49 U.S.C. §11504 (1989); Mont. Code Ann. §15-30-105 and §15-30-305.

STATEMENT OF THE CASE

On August 25, 1988, the Montana Department of Revenue issued an administrative subpoena to the tax manager of Burlington Northern Railroad Company. The subpoena directed the Railroad to produce Pay Report 830A, a tax information form covering all Burlington Northern employees who worked in Montana during 1986 and 1987.

Pay Report 830A is a document which contains the names of all Burlington Northern employees as well as each employee's address; social security number; employee identification number; state of residence; an itemized listing of all states in which each employee worked during a given year; wages earned by each employee in each state; and the amount of taxes withheld by Burlington Northern for each employee in each state.

Burlington Northern refused to provide the Pay Report for employees who were not residents of Montana and who did not earn 50 percent of their income in Montana. The Railroad claimed that it was exempt from providing the tax information report under 49 U.S.C. §11504(d) and, on September 29, 1988, the Railroad filed an action for declaratory judgment and for injunctive relief.

127 Burlington Northern employees affected by the action intervened. The employees moved to quash the subpoena on the ground that 49 U.S.C. §11504(d) prohibits the State of Montana from gathering tax information and reports about employees who are not residents of Montana and who do not earn more than 50 percent of their pay in Montana during a designated year. The intervening employees are all residents of the State of Washington. None of them earned more than 50 percent of his income in Montana and none travelled more than 50 percent of his total annual track miles in Montana in either 1986 or 1987.

The Montana District Court denied the employees' motion to quash, dismissed the Railroad's action and granted the state's motion for judicial enforcement of subpoena. The employees appealed.

The Montana Supreme Court affirmed the lower court, concluding:

(1) The supremacy clause of the Constitution was not violated by the Montana Department of Revenue's issuance of the subpoena because 49 U.S.C. §11504 does not affect the power of a state to levy taxes or to obtain tax-related payroll information, and (2) The commerce clause of the constitution was not violated because Montana has the authority to levy income taxes against non-resident railroad employees and consequently has the authority to gather information needed to assess and collect taxes.

STAGE IN PROCEEDINGS WHEN FEDERAL QUESTIONS WERE RAISED

The question that is at the core of this case is the

interpretation of a federal statute, namely 49 U.S.C. §11504. The federal question has been before the court since the initial pleading was filed.

The Complaint for Declaratory and Injunctive Relief which was filed September 29, 1988, alleged that the actions of the Montana Department of Revenue violated federal law. (A copy of the Complaint is included in the Appendix, A-2).

On October 24, 1988, the Burlington Northern employees moved to intervene in the action, alleging that the federal law, rather than Montana State law, governed this case. (A copy of the Motion to Intervene is included in the Appendix, A-4).

On February 13, 1989, the Montana District Court rendered a decision in which it determined that the federal statute, 49 U.S.C. §11504

does not restrict a state's authority to tax income earned within that state. Likewise, the statute does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena.

(A copy of the trial judge's Memorandum and Order and of its February 22, 1989, Judgment are included in the Appendix, A-6, A-8)

The Burlington Northern employees appealed.

The sole issue presented for review to the Montana Supreme Court was whether 49 U.S.C. §11504(d) prohibited the State of Montana from issuing an administrative subpoena requiring Burlington Northern Railroad to provide Pay Report 830A for employees who were residents of Washington State and who did not earn more than one-half of their income in Montana.

REASONS WHY THE WRIT SHOULD BE GRANTED

The only issue to be determined in this case is one of statutory construction: What did Congress intend by the enactment of 49 U.S.C. §11504?

The answer to that question will resolve the additional issues which relate to the Constitutional impact of the statute upon the State of Montana.

The Montana Supreme Court has decided that this federal

statute has no impact on the State of Montana. The court ruled: (1) Montana has the power to tax non-resident railroad employees who earn less than 50 percent of their income in the State of Montana and (2) The Montana Department of Revenue may require a rail carrier to provide to it tax information and wage reports concerning all of the carrier's employees.

The Montana court's decision interprets an important federal law in a way that makes it meaningless. This Court has not yet had an opportunity to interpret 49 U.S.C. §11504. Because of the effect of this law on every state in the Nation, this Court should settle the issue raised by this case.

The Burlington Northern employees believe that the Montana court erred in its interpretation of 49 U.S.C. §11504. Indeed, the actions of the Montana Department of Revenue, pursuant to Montana law, directly contravene the federal statute thus violating the Supremacy and Commerce clauses of the United States Constitution.

1. The gathering of payroll/tax information by the Montana Department of Revenue from Burlington Northern Railroad about its non-resident employees who earn less than 50 percent of their income in Montana conflicts with 49 U.S.C. §11504(d) and such actions cannot be implemented without violating the Supremacy Clause of the Constitution.

The federal statute which governs the ability of individual states to require withholding and to collect tax-related information from rail carrier-employers is 49 U.S.C. §11504. That statute provides:

(a)(2) A rail, express, or sleeping car carrier providing transportation subject to jurisdiction of the Interstate Commerce Commission . . . shall withhold from the pay of an employee . . . only income tax required to be withheld by the laws of a State, or subdivision of that State—

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(b) that is the residence of the employee (as shown

on the; employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year. . .

(d) A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

(Full text of the statute is in Appendix, A-7)

In interpreting this section, the Montana Supreme Court held:

Section 11504 directs itself only to the problem of withholding state income taxes and of filing mandatory reports by the carrier. Neither of these have a direct bearing on the power of a state or other governmental entity to levy income taxes. We hold . . . that section 11504 does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena. There is, therefore, no conflict to which the Supremacy Clause of the United States Constitution would apply. (Appendix A-11, p. 30).

The Montana court's interpretation of the federal statute is unreasonably restrictive. The Montana court decided that 49 U.S.C. §11504 applies only to those instances when "rail carriers can be required by state law to file state income tax information returns respecting its employees." (Emphasis original.) It then erroneously concluded that the federal law did not intend to prevent states from requiring rail carriers to submit tax information and reports about employees in all instances.

Based on its faulty interpretation of the federal law, the Montana Supreme Court found no conflict between 49 U.S.C.

§11504 and the Montana statutes. Those statutes include the income tax law under which Montana levies an income tax upon

every person not a resident of the state on his or her net income from every business, trade, profession or occupation carried on in the state.

Mont. Code Ann. §15-30-105. (Appendix A-9).

The Montana Department of Revenue is authorized to make such rules and require such facts and information to be reported as it deems necessary to enforce the income tax laws. Mont. Code Ann. §15-30-305. (Appendix A-10).

The Montana Supreme Court held that these statutes authorize the Montana Department of Revenue, through the use of administrative subpoenas, to require the railroad to supply Pay Report 830A—a tax information report—to the State of Montana.

This, claimed the Montana court, does not violate the supremacy clause.

The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

Thus, to the extent that Montana's tax reporting statutes and regulations do not conflict with federal statutes they are enforceable. But if Montana's laws and regulations are in conflict with federal law, then the Supremacy Clause of the constitution requires that federal law must prevail. Hamm v. City of Rock Hill, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964).

A clear reading of §11504(d) shows that it is in conflict with Montana's tax report collection procedure. The statute unambiguously states that a "rail . . . carrier withholding pay

from an employee under . . . this section shall file income tax information returns and other reports only with" the state in which the employee is a resident or in which the employee earns 50 percent or more of his pay. (Emphasis added.)

A statute which is clear and unambiguous on its face leaves no room for judicial interpretation. Rubin v. United States, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed. 857 (1981).

Had Congress intended that the rail carriers be required to file income tax information reports with any state demanding such information, Congress would not have limited the filings as it did.

Even if the Montana court had been able to find the statute to be ambiguous on its face and thus open to judicial interpretation, it would have had to find that there was no intent of Congress to limit the states' ability to obtain information about every employee who passes through a state while employed by a rail carrier.

Legislative history shows Congress intended to prohibit states from requiring rail carriers to file tax-related information and reports except where the affected employee was a resident of the state or where he earned more than 50 percent of his income in that state.

The problem addressed by this legislation is peculiar to those employees who are required by the nature of their employment to work in more than one State on a regular basis. Tax policies in some States have created great hardships both for interstate carriers and interstate carrier employees. . . .

The employer is also confronted with serious problems. . . . Some States which do not require withholding nonetheless require the employer to file periodic information returns. Where several States and numerous employees are involved, the administrative load can be extremely onerous for the employer.

S. Rep. No. 1261, 91st Cong., 2d Sess. (1970).

Recently Congress introduced a bill to amend Section 11504 which, once passed, will clarify this question. The

amendment would change the law to read:

(a) No part of the compensation paid by a rail carrier . . . to an employee . . . shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

...
(d)(1) A rail . . . carrier withholding pay from an employee under subsection (a) of this section shall file income tax information returns and other reports only with the State and subdivision of residence of the employee . .

H.R. 2364, 101st Cong., 1st Sess. (1989).

The purpose of the amendment is not to substantially change existing law, but only to "replace the existing [50 percent] formula and provide that such an employee will be subject to the income tax laws only in the state or subdivision thereof in which the employee resides. This is similar to how airline employees are treated under Federal law." H.R. Rep. No. 207, 101st Cong., 1st Sess. (1989).¹

The Montana Supreme Court erred in its interpretation of 49 U.S.C. §11504. It appears that a proper interpretation of the statute would preempt enforcement of the administrative subpoena in this case, as Montana's regulations and the federal statute are in conflict. The Supremacy Clause must therefore apply.

At the very minimum, this Court should settle the question so that interpretation of this statute is finally resolved, rather than left to the variety of interpretations that likely will occur from state to state.

2. Montana's use of an administrative subpoena to obtain detailed payroll information about railroad employees

¹The statute governing state taxation of airline employees' income provides that only the state of residence of any such employee is entitled to levy a tax upon the employee's income. 49 U.S.C. §1512.

results in an unreasonable burden being placed on interstate commerce and thus violates the Commerce Clause of the United States Constitution.

The Commerce Clause states:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const., art. I, sec. 8, cl. 3.

The power granted to Congress by the Commerce Clause means that an individual state may not enact a law which imposes a direct burden upon interstate commerce. Kansas City Southern R. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 34 S.Ct. 564, 58 L.Ed. 857 (1914).

The Montana Supreme Court found, first, that 49 U.S.C. §11504 did not affect the right of Montana to levy income taxes upon non-resident Burlington Northern Railroad employees who worked as they travelled through Montana.² The court went on to find that since Montana had a right to tax the

²The question of Montana's authority to tax any income of non-residents was not before the Montana Supreme Court. The court's assumption that Montana had the power to tax non-resident employees of a railroad who earn less than one-half of their income in the state is believed by the employees to be erroneous. This question is currently being litigated in Montana in the case of Grooms v. Montana, Flathead County, Montana, District Court Cause No. DV-89-242B. At least one state has determined that an individual state does not have the right to tax railroad employees who travel through the state, but who are non-residents and who do not earn a substantial portion of their wages in that state. Blangers v. Idaho Department of Revenue, 114 Idaho 944, 763 P.2d 1052 (1988), cert. denied, _____ U.S. _____, 109 S.Ct. 1557, 103 L.Ed. 860 (1989). The proposed amendment of 49 U.S.C. §11504, currently pending in Congress, would clearly prohibit Montana from taxing non-resident railroad employees.

The four factors which this court has held must be present before a state may impose an income tax without violating the Commerce Clause of the Constitution are not present in this case. See Amerada Hess Corp. v. New Jersey, 490 U.S. _____, 109 S.Ct. 1617, 104 L.Ed. 2d 58 (1989).

employees, it must also have the right to use whatever means it deems necessary to gather information needed to apply and administer the tax. Because Montana had the right to demand the information, the demand could not, reasoned the Montana Supreme Court, constitute an unreasonable burden on interstate commerce. The Montana court found that Congress could not have meant to limit the state's ability to gather tax-related information and reports.

Congress meant exactly that. In creating legislation that would regulate railroads involved in interstate commerce, Congress was aware of the burden of paperwork created by the revenue departments of each state.

Congress recognized the burden that multiple reporting requirements placed upon the rail carriers. Speaking on behalf of enactment of the law, Senator Prouty stated that the law would reduce

the burden upon the employer associated with multiple withholding and/or the filing of information returns with the vast number of States in which his employee may operate for some portion of any given tax year

116 Cong. Rec. 40,313 (1970).

Congress did not intend to eliminate rail employees' tax liability altogether or to eliminate state requirements for railroad reporting of employee income. What Congress intended—as is clearly shown by the law—is to limit the liability and the reporting to two states, the state in which the employee resides and the state in which the employee earns more than 50 percent of his pay.

Montana is neither the state of residence of the petitioning employees nor is it the state in which any of them earned more than 50 percent of his income in 1986 and 1987. Montana therefore cannot require reports about these employees without invading Congress's right to regulate interstate commerce and without unreasonably burdening interstate commerce.

CONCLUSION

The Montana Supreme Court has incorrectly interpreted a federal law. Because of the pervasive impact of 49 U.S.C. §11504, the proper meaning of the law should be determined by this court. This court should grant this petition and issue a writ of certiorari to the Supreme Court of the State of Montana.

POWELL & MORRIS, P.S.

By

William J. Powell

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(509) 455-9080

Counsel for Petitioners

STATE OF MONTANA
DEPARTMENT OF REVENUE

IN RE: BURLINGTON) ORDER TO PRODUCE RECORDS
NORTHERN, INC.,) (SUBPOENA DUCES TECUM)

.....

TO: Tax Manager
Burlington Northern Railroad Company
P.O. Box 64957
St. Paul, MN 55164-0952

YOU ARE HEREBY DIRECTED TO PRODUCE and make available to the Department of Revenue, its investigators and employees, as agents of the undersigned, on the 30th day of August, 1988, original records of certain individuals.

The documents which you are hereby required to produce and make available shall include, without limiting the generality of the foregoing:

Pay 830A report (or facsimile) for 1986 and 1987.

This Subpoena is issued in accordance with and pursuant to 53-2-501 and 15-1-301, MCA.

DATED this 25th day of August, 1988.

STATE OF MONTANA

/s/ JOHN D. LaFAVER, Director
Department of Revenue

STATE OF MONTANA)
)
County of Lewis & Clark) ss.

I, Charlotte Mckay, BEING FIRST DULY SWORN ON
OATH DEPOSES AND SAYS:

That I personally deposited the foregoing Subpoena in the
U.S. Mail on this 30th day of August, 1988.

/s/C Maling
Agent

/s/Shelly R. Baines
Notary Public for the
State of Montana
Residing at Helena
My Commission Expires:
1-31-89

BROWNING, KALECZYC, BERRY & HOVEN, P.C.
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(406) 449-6220
Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT, STATE OF MONTANA

BURLINGTON NORTHERN, INC.,)	
and BURLINGTON NORTHERN)	
RAILROAD)	
COMPANY,	)	Cause No.
Plaintiffs,)	
	)	COMPLAINT FOR
V	)	DECLARATORY
	)	AND INJUNCTIVE
MONTANA DEPARTMENT	)	RELIEF
OF REVENUE,)	
)	
Defendant.)	

.....

PARTIES

- 1. Burlington Northern, Inc., ("BNI") is a Delaware Corporation doing business in Montana through one or more of its wholly owned subsidiaries, including Burlington Northern Railroad Company.
- 2. Burlington Northern Railroad Company ("BNRR") is a Delaware Corporation doing business in interstate commerce, including Montana.
- 3. The Montana Department of Revenue ("Department") is an agency of the State of Montana.

FACTS

- 4. BNRR employs trainmen, who, while operating trains,

travel in interstate commerce both within and without the State of Montana, and also employs maintenance crews who work both within and without the State of Montana.

5. Employees on these train and maintenance crews are residents of various states. The state in which any such employee spends more than 50 percent of his or her working hours, or travels more than 50 percent of the total mileage he or she travels while operating a train for BNRR, is not necessarily the state of residence of any such employee.

6. On or about August 25, 1988 the Department, acting through its Director, issued an administrative subpoena, which was sent to plaintiffs on or about August 30, 1988, addressed to the tax manager of BNRR directing the BNRR produce a document referred to as the "Pay 830A Report (or facsimile) for 1986 and 1987." The return date of the subpoena was listed as August 30, 1988. Thereafter, the Department advised BNRR that the return date should have been stated as September 30, 1988 and corrected its clerical error.

7. BNRR is informed and believes that the Department is seeking Pay Report 830C, a report created and maintained by BNRR which lists, inter alia, the name, address, social security number state of residence, wages earned for work performed in Montana, and Montana withheld for each train crew member and maintenance crew member whose employment during each reporting period included work performed in the State of Montana.

8. BNRR is subject to 49 U.S.C. § 11504 which provides, in pertinent part, that BNRR shall withhold for State income tax purposes a portion of the salary of any employees only for the state in which the employee earns more than 50 percent of the pay received from BNRR, or for the state which is the residence of the employee if the employee did not earn in any one state more than 50 percent of the pay received by the employee from BNRR during the preceding calendar year.

9. Section 11504 also provides that BNRR shall file income tax information returns or other reports only with the state of residence of each of its employees and the state in which withholding of pay is required pursuant to § 11504, as explained in paragraph 8 hereinabove.

10. BNRR Pay Report 830C includes information concerning employees who work fewer than 50 percent of their total work hours in Montana or who travel in Montana less than 50 percent of their total miles traveled. BNRR Pay Report 830C includes wage and withholding information for employees for who BNRR is not required to withhold wages for Montana income taxes pursuant to 49 U.S.C. § 11504.

COUNT I.

11. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraph 1-10 of this Complaint.

12. The administrative subpoena issued by the Department is arbitrary, capricious, overly broad, and in violation of applicable law in that it requires BNRR to produce information which it is prohibited from divulging pursuant to 49 USC § 11504, and thus unduly burdens interstate commerce.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a judicial declaration that the plaintiffs here are required only to file income tax information returns with or provide other documents or information to the Montana Department of Revenue concerning employees who work on train or maintenance crews in interstate commerce as provided in 49 U.S.C. § 11504;

2. Issue a judicial declaration that the administrative subpoena at issue here is void in that it is arbitrary, capricious, and overly broad in scope in that it is required plaintiffs to provide information in violation of applicable federal law and thus unduly burdens interstate commerce;

3. Prohibit the Montana Department of Revenue from seeking enforcement of its administrative subpoena since that subpoena as issued is arbitrary, capricious, overly broad, in violation of applicable law and unduly burdens interstate commerce;

4. Grant to Plaintiffs attorneys' fees and costs; and

5. Grant such other relief as may be just and proper.

DATED this 29th day of September, 1988.

BROWNING, KALECZYC,
BERRY & HOVEN, P.C.

By /s/ Stanley T. Kaleczyc
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN, INC.)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,)	
)	
Plaintiff,	)	Cause No.
	)	BDV-88-797
- vs-)	
	)	<u>ANSWER TO</u>
MONTANA DEPARTMENT	)	<u>COMPLAINT AND</u>
OF REVENUE,	)	<u>COUNTER CLAIM</u>
)	
Defendant.)	

-
1. In answer to Paragraphs 1, 2, 3, 4, 5, 6, 10, and 11 the Montana Department of Revenue admits that truth of the allegation contained in Plaintiff's Complaint.
 2. In answer to Paragraph 7, the Montana Department of Revenue affirmatively alleges the document which it is seeking by virtue of the administrative subpoena served upon the plaintiff is "Pay Report 830A", therefore the department denies the allegation of the Plaintiff as set forth in Paragraph 7 of its Complaint.
 3. In answer to Paragraph 8, the Montana Department of Revenue admits the Plaintiffs is subject to the provisions of 49 U.S.C. § 11504. However, the Department does not agree with

or admit the truth of the paraphrasing of the meaning or legislative intent as stated by Plaintiff in Paragraph 8. The Department affirmatively alleges the statute speaks for itself.

4. In answer to Paragraph 9, the Montana Department of Revenue affirmatively alleges that pursuant to 49 U.S.C. § 11504, the Plaintiff is required to comply with only certain states' tax laws regarding the withholding of income tax and the filing of certain information returns. Further, the Department affirmatively alleges the statute speaks for itself.

5. In answer to Paragraph 12, the Montana Department of Revenue denies the truth of the allegation as set forth in Paragraph 12 of Plaintiff's Complaint. The Department affirmatively alleges that the administrative subpoena issued by the Department on August 30, if in full compliance with all applicable state and federal statutes.

PRAYER

WHEREFORE, The Defendant prays as follows:

1. That the Respondent be granted Judgment in its favor;
2. That Plaintiffs take nothing by their action;
3. That Defendant be awarded its costs of suit herein; and
4. That Defendant have such other and further relief as the Course may deem just and equitable.

COUNTER CLAIM

COMPLAINT FOR JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENA

In support of its Complaint for Judicial Enforcement of its Administrative Subpoena the Department of Revenue alleges that:

1. Burlington Northern, Inc. is a Delaware Corporation doing business in Montana through one or more of its wholly owned subsidiaries, including Burlington Northern Railroad Company.

2. Burlington Northern Railroad Company is a Delaware Corporation doing business in interstate commerce including

Montana.

3. The Montana Department of Revenue is an executive branch agency of the State of Montana, which is charged with the responsibility and duty of administration, enforcement, and compliance with the state's tax laws, and in particular the administration, enforcement, and compliance of the state income tax.

4. On or about August 25, 1988 the Department, acting through the Director of Revenue, issued an administrative subpoena in conformity with all the applicable statutory provisions directing the Burlington Northern Railroad Company produce a document denominated as "Pay Report 830A".

5. The return date for the subpoena was erroneously set as August 30, 1988. Thereafter, the Department advised the Burlington Northern Railroad that the correct date was September 30, 1988.

6. The Burlington Northern Railroad Co., has failed to provide the information to the Montana Department of Revenue or its agents as required by the subpoena, and therefore the Department is required to commence this action for enforcement of its subpoena.

7. The State of Montana acting through its Department of Revenue is empowered by the laws of the State of Montana to enforce compliance with laws of Montana in regard to taxation. In furthermore of those powers the Department is empowered to summon witnesses and request the production of documents.

8. Every person not resident of the State of Montana is subject to a tax with respect to his entire net income from all property owned and from every business, trade, profession, or occupation carried on in this state.

9. The Burlington Northern Railroad Inc. employs nonresident personnel in the operation of its railroad who earn income from a trade, profession, or occupation carried on in this state.

10. Pursuant to the laws of the State of Montana, the State of Montana, Department of Revenue has the authority and the power to request and receive information from the Burlington Northern Railroad Inc., to determine the names, addresses, and amounts of income earned by its personnel who earn

income from a trade, profession, or occupation carried on in this state.

11. 49 U.S.C. § 11504, is not a bar to the Department of Revenue to restrain it from performing its duties to determine the names and incomes of nonresidents subject to the tax laws of Montana or for requesting and receiving information from the Burlington Northern Railroad, Inc. to carry out those duties and responsibilities.

PRAYER FOR RELIEF

Wherefore, the State of Montana, acting through its Department of Revenue requests this court to:

1. Issue an order directing the Burlington Northern Railroad Inc. to comply with the administrative subpoena issued by the Department of Revenue on August 25, 1988, by producing "Pay Report 830A" at a date and time set by the Court;
 2. Grant to the State of Montana its attorneys' fees and costs; —
 3. Grant such other relief as may be just and proper.
- DATED this 11 day of October, 1988.

DEPARTMENT OF REVENUE
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620-2702

/s/ R. Bruce McGinnis
Tax Counsel

CERTIFICATE OF SERVICE

I certify that on this 11 day of October, 1988, a true and correct copy of the foregoing has been served by placing same in the United State mail, postage prepaid, and addressed as follows:

Stanley T. Kaleczyc
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
P.O. Box 1697
Helena, Montana 59624-1697

/s/ R. Bruce McGinnis

POWELL & MORRIS, P.S.
William J. Powell
West 220 Main
Spokane, WA 99201
(509) 455-9080

LARRY ELISON
1101 Greenough Dr., Suite B-8
Missoula, MT 59802

ATTORNEYS FOR INTERVENORS

IN THE FIRST JUDICIAL DISTRICT STATE OF MONTANA

BURLINGTON NORTHERN, INC.,)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,	)	Cause No.
	)	BDV 88 797
Plaintiffs)	
)	
vs.	)	MOTION TO
	)	INTERVENE
MONTANA DEPARTMENT OF)	
REVENUE,)	
)	
Defendant.)	
)	
JAMES R. ALLAN JERRY A.)	
BAKER, PATRICK R. BARTLESON,)	
THOMAS E. BENDER, ROBERT F.)	
BLANGERES, RONALD V. BLANK,)	
CHARLES F. BRENNAN, DONALD)	
D. BUTTS, RANDY CARTWRIGHT,)	
CLIFFORD DAVIS, R.J. EDGAR,)	
MICHAEL FISK, J.E. FLANNERY,)	
W.P. FOSTER, MARVIN L. FRANZ,)	
GARY L. FRIBERG, STEVEN E.)	
GARLAND, FREDERICK E. GEST,)	

ROBERT J. GRIFFIN, WILLIAM B.)
 GRIMES, ROBERT L. GROOMS,)
 PATRICK L. HARRINGTON,)
 DONALD J. HEINEN, VIC A.)
 HERRINGTON, JOHN HLUBOKY,)
 ROBERT D. HOUX, DONALD C.)
 HOWARD, ROBERT K.)
 HUGUENIN, DUANE JUMP,)
 GEORGE L. KENDALL, ROBERT)
 W. KING, JOHN A. KLOMP, L.P.)
 KNUTSON, JERRY D.)
 KOHLIEBER, RICHARD P. KOHN,)
 KENNETH M. LEYDE, LARRY G.)
 MACARTY, HARRY MAIER,)
 THOMAS A. MARABELLO, E.G.)
 MATHENA, DONALD W. MAY,)
 PATRICK M. McCARTHY, JOHN H.)
 PEBLES, JACK A. PETERSON, JOE)
 D. PILIK, L.W. PINKLEY, W.G.)
 QUINTON, DONALD M. REID,)
 JOHN E. ROSSI, JAMES C. SCOTT,)
 WARREN H. SHOOP, GARY R.)
 SMITH, DONALD H. STIER,)
 MICHAEL J. STOWELL, ROBERT)
 J. STRAHL, THOMAS L. TAYLOR,)
 JAMES H. THOMSON, DAVID J.)
 WARDIAN, TIMOTHY J. WATSON,)
 JAMES H. WEAVER, JEFFREY D.)
 WEST, LOUIS F. WILLIAMS,)
 MICHAEL A. WILLIAMS, STEVEN)
 M. WILSON, KEN WOLKENHAUER,)

Intervenors.)

PURSUANT to Montana Civil Rule 24, the above-named
 intervenors hereby move to intervene in the above action both
 as a matter of right and permissive intervention, and in support
 thereof show as follows:

1. As appears from the proposed complaint of intervenors attached hereto, each of the applicants claims an interest relating to the transaction which is the subject of this action, namely the enforcement of quashing of a subpoena for payroll information from Burlington Northern Railroad Company. Each of the intervenors is so situated that the disposition of this action may as a practical matter impair or impede his ability to protect his interest. The interest intervenors seek to protect is their claim of exemption of their earnings from income tax by the State of Montana due to the fact that each of the intervenors is a resident of the State of Washington is a member of an interstate train crew, and does not travel more than 50% of his track miles within the State of Montana. Each of the intervenors claims that his income is exempt from taxation and from the furnishing of information relating thereto under the provisions of 49 U.S. Code, Section 11504.

2. Intervenors also assert a claim for permissive intervention in that their claims and the main action have a questions of law or fact in common. The common question of law or fact is the applicability of 49 U.S. Code. Section 11504 to the claim asserted by the Montana Department of Revenue to payroll information from Burlington Northern Railroad Company, particularly as applies to payroll information concerning the plaintiffs, each of whom claim to be exempt from income tax withholding and from the furnishing of such information pursuant to 49 U.S. Code, Section 11504. Intervenors seek injunctions against both parties to enforce 49 U.S. Code, Section 11504.

3. In addition, several of the intervenors seek damages from plaintiffs Burlington Northern for withholding taxes from their pay in violation of 49 U.S. Code, Section 11504.

4. Other intervenors seek damages from the Montana Department of Revenue for prejudgment garnishment without notice or opportunity to be heard in violation of due process.

5. This motion is timely made within 21 days of the filing of the above-captioned action.

6. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, but will clarify the rights of the parties. The intervenors are the ones from whom the State of Montana is seeking the collect taxes, and are

therefore the real parties in interest in this litigation.
DATED: October 18, 1988.

POWELL & MORRIS, P.S.

/s/ William O. Powell

Larry Elison
1101 Greenough Dr.
Suite B-8
Missoula, MT 59802

ATTORNEYS FOR
INTERVENORS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN
RAILROAD

vs

#CDV-88-797

THE DEPARTMENT OF
REVENUE

This was the time set for hearing on the Motion of the Department of Revenue to Compel, the Motion to Quash and the Motion to Intervene. Present in Court were Stan Kaleczyc, counsel for the Plaintiff, Bruce McGinnis, counsel for the Department of Revenue and Martin Elison, counsel for the Intervenor. Counsel argued the motion to intervene and the Court allowed the intervention on the question of the interpretation of 49 USC 11054. Counsel then argued the remaining motions. The Intervenor is to file their brief on the interpretation of 49 USC 11054 by November 14, 1988 and reply briefs are to be filed by November 21, 1988. The matter will then be deemed submitted.

THOMAS C. HONZEL
Presiding Judge

MINUTE ENTRY
November 1, 1988

CATHERINE JOHNSON
Court Reporter

cc: Stan Kaleczyc
Attorney at Law
P.O. Box 1697
Helena, MT 59624-1697

Bruce McGinnis
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, MT 95620-2702

Martin J. Elison
Attorney at Law
1135 Strand Avenue
Missoula, MT 59802

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN INC.,)
and BURLINGTON NORTHERN)
RAILROAD COMPANY,)

Plaintiffs,)

vs)

Cause No. CDV-88-797

MONTANA DEPARTMENT OF)
REVENUE,)

Defendant,)

vs)

BURLINGTON NORTHERN)
RAILROAD COMPANY)
EMPLOYEES)

Intervenor Plaintiffs.)

This action came before the court for hearing on October 28, 1988. The issues were heard, a decision was rendered, and it is hereby ORDERED AND DECREED,

That the Plaintiffs Burlington Northern, Inc., Burlington Northern Railroad Company, and Intervenor Plaintiffs Burlington Northern Railroad Company Employees' Motion to Quash Administrative Subpoena Duces Tecum is denied, and the Plaintiffs' Complaint for Declaratory Judgment and Injunction is dismissed.

That the Defendants, State of Montana, Department of Revenue's Motion for Judicial Enforcement of Administrative Subpoena is granted.

DATED this 22 day of February, 1989.

Thomas C. Honzel
District Judge

§ 11504. Withholding State and local income tax by certain carriers

(a)(1) In this subsection, an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of a State if the employee —

(A) performs regularly assigned duties on a locomotive, car or other track-borne vehicle in at least 2 States and the mileage traveled in one State or subdivision of that State is more than 50 percent of the total mileage traveled by the employee while employed during the calendar year; or

(B) is engaged principally in maintaining roadways, signals, communications, and structures or in operating motortrucks from railroad terminals in at least 2 States and the percent of the time worked by the employee in one State or subdivision of that State is more than 50 percent of the total time worked by the employee while employed during the calendar year.

(2) A rail, express, or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title [49 USCS §§ 10501 et seq.] shall withhold from the pay of an employee referred to in paragraph (1) of this subsection only income tax required to be withheld by the laws of a State, or subdivision of that State —

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier, or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(b)(1) In this subsection —

(A) "State" includes a State, territory, or possession of the United States, and the Commonwealth of Puerto Rico.

(B) an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of a State in which the mileage traveled by the employee in that State or subdivision is more than 50 percent of the total mileage traveled by the employee while employed during the calendar year.

(2) A motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] and a motor private carrier shall withhold from the pay of an employee having regularly assigned duties on a motor vehicle in at least 2 States, only income tax required to be withheld by the laws of a State, or subdivision of the State —

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(c)(1) In this subsection, an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of that State in which the time worked by the employee in the State or subdivision is more than 50 percent of the total time worked by the employee while employed during the calendar year.

(2) A water carrier providing transportation subject to the jurisdiction of the Commission under subchapter III or chapter 105 of this title [49 USCS §§ 10541 et. seq.] or a water carrier or class of water carriers providing transportation on inland or coastal waters under a exemption under this subtitle shall file income tax information returns and other reports only with —

(A) the State and subdivision of residence of the employee (as shown on the employment records of the carrier); and

(B) the State and subdivision in which the employee earned more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(3) This subsection applies to pay of a master, officer, or seaman who is a member of the crew on a vessel engaged in foreign, coastwise, intercoastal or noncontiguous trade or in the fisheries of the United States.

(d) A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with —

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1446.)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN, INC.)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,)	
)	
Plaintiff,	)	Cause No.
	)	CDV-88-797
vs	)	MEMORANDUM
	)	AND ORDER
MONTANA DEPARTMENT)	
OF REVENUE,)	
)	
Defendant)	
)	
vs)	
)	
BURLINGTON NORTHERN)	
RAILROAD COMPANY)	
EMPLOYEES,)	
)	
Intervenor Plaintiffs.)	

• • • • •

Before the Court is the motion of Burlington Northern, Inc. (BNI) and Burlington Northern Railroad Company (BNRR) to quash the administrative subpoena duces tecum of the Montana Department of Revenue (Department) wherein the Department is seeking certain tax information regarding BNRR employees. Also, before the Court is the Department's motion for judicial enforcement of its administrative subpoena. The matter has been fully briefed and argued and is not ready for decision.

BACKGROUND

On August 25, 1988, the Department directed an administrative subpoena to BNRR requesting a copy of "Pay Report 830A" for the years 1986 and 1987. BNRR did not

comply with the subpoena and on September 29, 1988 filed this action for declaratory and injunctive relief.

On October 24, 1988, sixty-two BNRR employees moved to intervene. The Court granted the motion on November 1, 1988, but limited the scope to the question of whether the administrative subpoena should be quashed.

A motion for joinder of sixty-five additional BNRR employee intervenors was filed on November 10, 1988. On December 1, 1988, the parties stipulated to the joinder of these additional intervenors and on December 8, 1988, the Court granted the motion for joinder of additional intervenors.

DISCUSSION

The Department is seeking a document referred to as Pay Report 830A. This document contains the names of BNRR employees, their addresses, social security numbers, the employee's identification number assigned by BNRR, state of residence, an itemized listing of all states in which the employee worked during a given year, wages earned by the employee in each state, and the amount withheld by BNRR in each state: (October 11, 1988 affidavit of Dave Olsen, Supervisor of Compliance Section of Income Tax Division of the Department.) The Department asserts that this information is needed to: identify individuals who have earned income within the State of Montana; to verify wages reported by BNRR employees on tax returns voluntarily filed; and to estimate tax liabilities of BNRR employees who earned income in Montana but who have not voluntarily filed tax returns.

It is undisputed that BNRR must withhold taxes and file reports for employees who are residents of Montana and who earn more than 50% of their income in Montana; employees who are residents of Montana and who do not earn more than 50% of their income in another state; and, employees who are not Montana residents but who earn more than 50% of their income in Montana. The Department contends that it is also entitled to payroll information for BNRR employees who are Montana residents but who earn more than 50% of their income in another state and for employees who are not Montana

residents but who earn a portion of their income in Montana which is less than 50% of their total income.

The issue in the case is whether the State of Montana can require the Plaintiffs to provide payroll information on employees who are exempt from Montana withholding or whether 49 U.S.C. Section 11504 prevents it from doing so.

Section 11504 (a)(2) provides:

A rail, express or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title [49 USCS Sections 10501 et seq.] shall withhold from the pay of an employee referred to in paragraph (1) of this subsection only income tax required to be withheld by the laws of a State, or subdivision of that State

—
(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year. (Emphasis added)

Section 11504 (d) provides:

A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with —

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section. (Emphasis added)

The statute specifically limits the ability of states to withhold taxes from employees of interstate carriers. Subsection (d) of

Section 11504 restricts filing of income tax information by carriers withholding pay to an employee's state of residency and to states which may require withholding under subsection (a) or (b). The thrust of this statute revolves around withholding pay for tax purposes and the filing of information for such purposes.

Section 11504 does not restrict a state's authority to tax income earned within that state. Likewise, the statute does not preclude a state from obtaining payroll information through the sue of a properly issued administrative subpoena. To interpret the statute differently would be to place restrictions on a state's ability to tax that was not intended by Congress.

In State of Alaska v. Petronia, 418 P.2d 755, 760 (1966), the Supreme Court of Washington stated:

As an outgrowth of this case, the United States Congress in 1959 passed a law, 46 U.S.C.A. Section 601, prohibiting the withholding of any sums from a master's, officer's, or seaman's wages for state tax purposes in vessels engaged in foreign, coastwise, intercoastal, interstate, or noncontiguous trade. However, the right of the Territory of Alaska to impose taxes was not disturbed; it was only the withholding of monies from seamen's wages to which Congress directed and asserted its jurisdiction.

Based on the foregoing, the Plaintiff's motion to quash is hereby DENIED and the State's motion for judicial enforcement of its administrative subpoena is GRANTED.

DATED this 10 day of February, 1989.

/s/ Thomas C. Honzel
DISTRICT JUDGE

105-30-105. Tax on nonresident — alternative tax based on gross sales. (1) A like tax is imposed upon every person not resident of this state, which tax shall be levied, collected, and paid annually at the rates specified in 15-30-103 with respect to his entire net income as here in defined from all property owned and from every business, trade, profession, or occupation carried on in this state.

(2) Pursuant to the provisions of Article III, section 2, of the Multistate Tax Compact, every nonresident taxpayer required to file a return and whose only activity in Montana consists of making sales and who does not own of rent real estate or tangible personal property within Montana and whose annual gross volume of sales made in Montana during the taxable year does not exceed \$100,000 may elect to pay an income tax of 1/2 of 1% of the dollar volume of gross sales made in Montana during the taxable year. Such tax shall be in lieu of the tax imposed under 15-30-103. The gross volume of sales made in Montana during the taxable year shall be determined according to the provisions of Article IV, sections 16 and 17, of the Multistate Tax Compact.

History: En. Sec. 3, Ch. 181, L. 1933; re-en. Sec. 2295.3, R.C.M. 1935; amd. Sec. 2, Ch. 253, L. 1959; amd. Sec. 1, Ch. 199, L. 1963; amd. Sec. 1, Ch. 15, L. 1971; R.C.M. 1947, 84-4903; amd. Sec. 1, Ch. 422, L. 1981.

15-30-305. Department rules. The department is hereby authorized to make such rules and to require such facts and information to be reported as it may deem necessary to enforce the provisions of this chapter.

History: En. Sec. 29, Ch. 181, L. 1933; re-en. Sec. 2295.29, R.C.M. 1935; amd. Sec. 179, Ch. 516, L. 1973; R.C.M. 1947, 84-4930.

No. 89-170

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

BURLINGTON NORTHERN, INC. and
BURLINGTON NORTHERN RAILROAD
COMPANY,

Plaintiffs

vs

MONTANA DEPARTMENT OF REVENUE,

Defendant and Respondent,

vs

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,

Intervenor Plaintiffs and
Appellants

APPEAL FROM: District Court of the First Judicial District,
In and for the County of Lewis & Clark,
The Honorable Thomas C. Honzel, Judge
presiding.

COUNSEL OF RECORD:

For Appellant:

Martin John Elison, Hardin, Montana
William J. Powell; Powell & Morris,
Spokane, Washington

For Respondent:

R. Bruce McGinnis, Dept. of Revenue,
Helena, Montana
Stanley T. Kaleczyc; Browning, Kaleczyc,
Berry and Hoven, Helena, Montana

Submitted on Briefs: Aug. 3, 1989

Decided: October 24, 1989

Filed: /s/ Ed Smith, Clerk

Justice John C. Sheehy delivered the Opinion of the Court.

Under 49 U.S.C. § 11504 (a)(2), an interstate rail carrier is required to withhold state income tax from the pay of its employees only (1) if the employee earns from the employer more than 50 percent of his pay in the particular state or (2) if the employee is a resident of the particular state, but does not earn more than 50 percent of his pay in any one state.

Under 49 U.S.C. § 11504 (d), an interstate rail carrier "shall file income tax information returns and other reports only with" (1) the state of residence of the employee and (2) the state in which the withholding of income tax is required under § 11504 (a)(2).

We hold in this case that the Montana Department of Revenue may obtain by administrative subpoena information relating to Montana earnings from an interstate rail carrier respecting its employees although the carrier is not obliged to withhold Montana state income tax, and is not required to file Montana state income tax information returns or other reports under 49 U.S.C. § 11504.

On August 25, 1988, the Department of Revenue issued an administrative subpoena to the tax manager of Burlington Northern Railroad Company, requesting Pay Report 830A for all its employees who worked in Montana for the years 1986 and 1987.

Burlington Northern refused to supply informational pay

reports for all such employees claiming exemption from providing tax information under 49 U.S.C. § 11504. On September 29, 1988, Burlington Northern filed an action for declaratory and injunctive relief in the District Court, First Judicial District, Lewis and Clark County. The Department of Revenue filed an answer to the complaint and counterclaimed for an order from the District Court directing Burlington Northern Railroad to comply with the administrative subpoena issued by the Department.

On October 24, 1988, 62 Burlington Northern employees moved to intervene. The District Court allowed intervention but limited the scope of the intervenor plaintiffs' action to the issue of whether the administrative subpoena should be quashed pursuant to 49 U.S.C. § 11504. On December 8, 1988, the District Court granted a motion for joinder of 65 additional Burlington Northern employees as intervenors.

On February 22, 1989, the District Court rendered judgment, denying Burlington Northern's and the intervenors' motion to quash the administrative subpoena duces tecum, granting Department's motion for judicial enforcement of the administrative subpoena, and dismissing the complaint for declaratory and injunctive relief. From this judgment, the intervenor plaintiffs only have appealed.

From the agreed facts in the pleadings, it is shown that Burlington Northern, Inc. is a corporation doing business in Montana through one or more of its wholly owned subsidiaries. Burlington Northern Railroad Company is a corporation doing a rail carrier business in interstate commerce. Burlington Northern employees, both trainmen and maintenance persons, work both within and outside Montana. These employees are residents of various states.

On August 25, 1988, the Department of Revenue issued an administrative subpoena duces tecum to Burlington Northern, directing it to produce "Pay Report 830A for 1986-1987." The subpoena was returnable on September 30, 1988. In response, Burlington Northern filed its complaint as above stated.

The single issue presented for review is whether 49 U.S.C. § 11504 prohibits the state of Montana from requiring Burlington Northern under an administrative subpoena duces tecum to provide Pay Report 830A concerning the intervenor plaintiffs,

who are residents of Washington, and who do not work more than 50 percent of time or track miles in Montana. Burlington Northern employees base their argument on the Supremacy Clause, and the Commerce Clause of the United States Constitution.

The state of Montana levies a state income tax upon the taxable income of its residents. Section 15-30-103, MCA. A like tax is imposed upon every person not a resident of the state on his or her net income from every business, trade, profession or occupation carried on in the state. Section 15-30-105, MCA. The Montana Department of Revenue is authorized to make such rules and to require such facts and information to be reported as it may deem necessary to enforce the provisions of the state income tax laws. Section 15-30-305, MCA.

On the other hand, 49 U.S.C. § 11504 (a)(2), provides:
A rail ...carrier providing transportation subject to the Jurisdiction of the Interstate Commerce Commission ...shall withhold from the pay of an employee ...only income tax required to be held by the laws of a state...

...

- (A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or
- (B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one state or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

With respect to filing reports, 49 U.S.C. § 11504 (d), provides;

A rail ...carrier withholding pay from an employee under [§ 11504 (a)(2)] shall file income tax information returns and other reports only with —

- (1) the state ...of residence of the employee; and
- (2) the state ...in which withholding of pay is required under [§ 11504 (a)(2)].

Burlington Northern employees contend that state laws or regulations permitting the issuance of an administrative subpoena to obtain state earnings information for nonresident employees are in direct conflict with the provisions of § 11504 and therefore under the Supremacy Clause of the United States Constitution, the administrative subpoena has no validity.

The Supremacy Clause of the United States Constitution, Art. VI, Clause 2, reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ...shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When there is a conflict between federal law and the application of an otherwise valid state enactment, the Supremacy Clause required that the federal law prevail. *Hamm v. City of Rock Hill* (1964), 370 U.S. 306, 311-312, 85 S. Ct. 384, 389, 13 L. Ed. 2d 300, 305.

Burlington Northern relies on the holding in *Hamm* and also the statement in *Aloha Airlines v. Director of Taxation of Hawaii* (1983), 464 U.S. 7, 12, 104 S. Ct. 291, 294, 78 L. Ed. 2d 10, 15, where the United States Supreme Court said:

[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute which imposes such a tax is pre-empted.

Burlington Northern employees also rely on the legislative history of § 11504 when it was before Congress, contending that the legislative history indicates a clear intent on the part of Congress to preclude states from obtaining such tax information.

There is a basic flaw in the Supremacy Clause argument posed by Burlington Northern employees in this case. It presupposes that the provisions of § 11504 and the state income tax laws, rules and regulations are in direct conflict.

This is not the case. Section 11504 directs itself to two subjects of state income taxation: when states can require interstate rail carriers to withhold taxes from their employees for application of the particular state's income tax laws; and, when the rail carrier can be required by state law to file with the state income tax information returns respecting its employees.

The language of § 11504 and its legislative history clearly indicate the purpose of Congress to relieve carriers engaged in interstate commerce from the burden of withholding income taxes and providing income tax information returns to every jurisdiction over which the carrier operated regardless of the size of those earnings. Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and of filing mandatory reports of the carrier. Neither of these have a direct bearing on the power of a state or other governmental entity to levy income taxes. We hold, as did the District Court, that § 11504 does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena. There is, therefore, no conflict to which the Supremacy Clause of the United States Constitution would apply.

The intervenors also argue that enforcement of the administrative subpoena duces tecum issued by the Department of Revenue is an unreasonable burden on interstate commerce.

The Commerce Clause of the United States Constitution (Art. 1, Section 8, Clause 3) provides:

That Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;...

Again, the intervenors rely on the legislative history of 49 U.S.C. § 11504, wherein the Senate report stated that the legislation was addressed to the problem of those employees who were required by the nature of their employment to work in more than one state on a regular basis. S. Rep. No. 91-1261, 91st Cong. 2d Sess. (1970).

We agree that under the Commerce Clause of the United States Constitution, a state may not enact a law or adopt procedures which unreasonably imposes a direct burden on interstate commerce or discriminates against it. *Union Pacific Railroad Company v. Woodahl* (D. Mont. 1970), 308 F. Supp. 1002, 1009. Senator Prouty, speaking in favor of the adoption of § 11504 stated on the floor of the Senate on December 3, 1970:

Nonetheless, Mr. President, the bill which you have before you, and which was agreed to in conference, is a very great step toward solving the unique tax problems of the employees of interstate common carriers, and, I might add, of the carriers themselves. While it does not limit the liability of such employees, it does limit the number of states which may require withholding from the compensation paid to an interstate carrier employee which may require the filing of information returns with respect to the compensation of such employees to not more than two.

Cong. Record, December 3, 1970, at 40313.

While § 11504 fixes the mandatory duties of employers engaged in interstate commerce to withhold taxes and to file reports respecting earnings in any particular state, the statute does not prohibit the furnishing of earnings information at the request of the state, or under a properly issued administrative subpoena. Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresident employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce. We so hold, because for one reason, such employees, while in Montana,

enjoy the comfort and protection of Montana's civil and criminal laws, and so must share a proportionate burden of the cost of such protections. *Washington Rev. Dept. v. Stevedoring Ass'n.* (1978), 435 U.s. 734, 748, 98 S. Ct. 1388, 1398, 55 L. Ed. 2d 682, 695.

This Court said:

The taxing power of a state is an essential power of its sovereignty (Citing a case.) This power cannot be set aside or limited on weightless statements that a federal policy is being substantially frustrated.

Commonwealth Edison Co., et al v. State of Montana (1980), 189 Mont. 191, 217, 615 P. 2d 847, 861.

We affirm the judgment of the District Court.

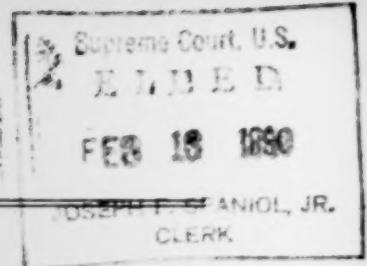
/s/ John C. Sheehy
Justice

We Concur:

/s/ J.A. Turnage
Chief Justice
/s/ Diane G. Borge
/s/ R.C. McDonough
/s/ Fred Weber
Justices



No. 89-1181



In The
Supreme Court of the United States
October Term, 1989

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,

Petitioner,

vs.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

R. BRUCE MCGINNIS*
Special Assistant
Attorney General
Office of Legal Affairs
Department of Revenue of
The State of Montana
Mitchell Building
Helena, Montana 59620
(406) 444-2852

*Attorney for Respondent,
Department of Revenue of
the State of Montana*

*Counsel of Record

February, 1990

29 p



QUESTION PRESENTED

The Montana Supreme Court affirmed a judgment enforcing an administrative subpoena requiring a rail carrier to supply payroll information to the State of Montana for the purpose of ascertaining which of the carrier's employees are subject to income taxation.

The question presented in this case is the following: Does 49 USC § 11504 apply to the circumstance of a State seeking necessary information from an employer to be able to exercise its sovereign power to tax the income of persons deriving income from a trade or occupation conducted within its boundaries.

**PARTIES INVOLVED IN THE PROCEEDING AND
RULE 29.1 STATEMENT**

The undersigned, counsel of record for the Montana Department of Revenue, certifies that the following have an interest in the outcome of this case:

State of Montana

Department of Revenue

Burlington Northern, Inc., and Burlington Northern
Railroad Company

Burlington Northern Railroad Company Employees

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___ (1989) 9Burlington Northern, Inc, et al. v. -Montana
Department of Revenue, 781 P.2d 1121 (Mont.
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OPINION BELOW

The Montana Supreme Court issued an opinion in this case which is reported *Burlington Northern, Inc, et al. v. Montana Department of Revenue*, ___ Mont. ___, 781 P.2d 1121 (1989). A copy of the Montana court's opinion is included in the Petitioners' Appendix to the Petition For Writ Of Certiorari at A-11, 28.

JURISDICTION

The Montana Department of Revenue agrees with the Petitioners' statement of jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Montana Department of Revenue concurs in the Petitioners' statement of constitutional provisions and statutes involved.

STATEMENT OF THE CASE

The Petitioners in their statement of the case have made misstatements of fact. On August 25, 1988, the Montana Department of Revenue issued a subpoena to the Burlington Northern Railroad requesting a copy of Pay Report 830A. Pay Report 830A is an internal payroll document prepared by Burlington Northern. The Department needs this information to be able to:

(a) Identify individuals who have earned income within the State of Montana;

(b) To verify wages reported by BNRR employees on tax returns voluntarily filed; and,

(c) Estimate tax liabilities of BNRR employees who earned income in Montana but refuse to voluntarily file a tax return.

Affidavit of David Olsen, Respondent's Appendix B, at 8a.

The Petitioners state Pay Report 830A is "a tax information form covering all Burlington Northern employees who worked in Montana during 1986 and 1987." The record in this matter does not support the Petitioners statement. Attached to Burlington Northern Incorporated's Complaint (Petitioner's Appendix, A-2) is an affidavit from Eric A. Engebrecht, Burlington Northern's tax manager. He states that Pay Report 830C is a payroll record for Burlington Northern Railroad. Respondent's Appendix, C, at 11a. Attached to the Department of Revenue's answer and counter claim (Petitioner's Appendix) is an affidavit from David Olsen, Department's Compliance Section Supervisor. He describes the information which he believes is contained in Pay Report 830A. The Department is seeking payroll information maintained by the Burlington Northern Railroad in the regular course of its business. It is not seeking a "tax information form."

The Petitioners' employer Burlington Northern Railroad commenced an action in the Montana District Court seeking an injunction and an order quashing the subpoena. In response, the Department filed an answer and a cross-complaint seeking enforcement of the Department's subpoena. The Petitioners were allowed to intervene. The

Petitioners alleged in their Motion For Intervention and along with it in their Complaint In Intervention that, "None of them earned more than 50 percent of his income in Montana and none traveled more than 50 percent of his total annual track miles in Montana in either 1986 or 1987." *Petition For Writ of Certiorari*, page 2. The District Court granted the Petitioners motion. Petitioners' Appendix A-5, 16. However, they were allowed to intervene on only a limited basis. The District Court's order makes it quite clear the Petitioners were allowed to intervene only "on the question of the interpretation of 49 USC § 11054 (sic)." District Court Order, Petitioner's Appendix, A-5, 16. Therefore, the Petitioners' statement that they do not travel 50 percent of their working miles or spend 50 percent of their time working in Montana are not facts contained in this record.

The Montana District Court denied the Burlington Northern's and the Petitioners' motion to quash the subpoena. The Petitioners appealed the District Court's judgment to the Montana Supreme Court.

The Montana Supreme Court affirmed the lower court on the following factual grounds:

From the agreed facts in the pleadings, it is shown that Burlington Northern, Inc. is a corporation doing business in Montana through one or more of its wholly owned subsidiaries. Burlington Northern Railroad Company is a corporation doing a rail carrier business in interstate commerce. Burlington Northern employees, both trainmen and maintenance persons, work both within and outside Montana. These employees are residents of various states.

The Court concluded:

While § 11504 fixes the mandatory duties of employers engaged in interstate commerce to withhold taxes and to file reports respecting earnings in any particular state, the statute does not prohibit the furnishing of earnings information at the request of the state, or under a properly issued administrative subpoena. Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresidents employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce.

Burlington Northern v. Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1125 (1989); Petitioner's Appendix A-11, 28.

STAGE IN PROCEEDINGS WHEN FEDERAL QUESTIONS WERE RAISED

The Montana Department of Revenue agrees with the Petitioners' statement of the stage in proceedings when federal questions were raised.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court will only grant review on a writ of certiorari, "when there are special and important reasons therefor." *Rule 17.1*, U.S.C.S., Supreme Court Rules. This

case does not present to the Court any special or important issues which call for its review. The issue presented in this case, as stated by the Montana Supreme Court is:

[W]hether 49 U.S.C. § 11504 prohibits the state of Montana from requiring Burlington Northern under an administrative subpoena duces tecum to provide Pay Report 830A concerning the intervenor plaintiffs, who are residents of Washington, and who do not work more than 50 percent of time or track miles in Montana.

Burlington Northern, Inc. v. Montana Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1123 (1989); Petitioners' Appendix A-11, 28-29.

The Montana Supreme Court concluded that Montana's attempt to obtain payroll information was not in conflict with the Supremacy Clause. It also concluded the subpoena was not a burden on interstate commerce because Congress did not intend § 11504 to apply in this situation.

Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and filing mandatory reports of the carrier.

Burlington Northern, *supra*, at 1124, Petitioner's Appendix, A-11, 31.

The Montana Court correctly decided the issue. This case presents a simple issue of statutory construction. While the statute in question is a federal statute the Montana Supreme Court's interpretation does not present a substantial federal question. *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935).

The Petitioners argue Montana is requiring their employer to file "tax information reports" which is prohibited by § 11504. That section provides in pertinent part that:

[d](2) A [rail, express, sleeping car,] motor, or motor private carrier withholding pay from an employee under subsection [(a) or] (b) of this section shall file income tax information returns and other reports only with -

[(1)](A) the State and subdivision of residence of the employee; and

[(2)](B) the State and subdivision in which withholding of pay is required under subsection [(a) or] (b) of this section.

The Petitioners argue the Montana Supreme Court's decision makes this section meaningless. They refuse to accept this factual situation has already been reviewed by two courts. Both courts determined § 11504 has no application in this case. The Respondent is not requiring their employer to file any "tax information reports." All the State is asking is that Montana be allowed to obtain the information necessary to determine which of Burlington Northern's employees are working in Montana. The State also needs to know how much income they earned while

working in Montana. The Petitioners are attempting to stretch the application of § 11504 to a situation which Congress never intended. By arguing that § 11504 prohibits the State from obtaining such information the Petitioners are in effect arguing the State has no power to tax their earnings. It was never the intent of Congress by its enactment of § 11504 to restrict the states power to tax nonresidents. The Montana Supreme Court ably expressed the error in Petitioners' argument stating:

There is a basic flaw in the Supremacy Clause argument posed by Burlington Northern employees in this case. It presupposes that the provisions of § 11504 and the state income tax laws, rules and regulations are in direct conflict. This is not the case. . . .

Burlington Northern Railroad v. Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1124 (1989); Petitioner's Appendix A-11, 30-31.

The Montana Court's decision correctly interpreted the legislative intent of Congress. The Court held:

Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and filing mandatory reports of the carrier.

Burlington Northern, *supra* at 1124, Petitioner's Appendix A-11, 31.

The legislative history of 49 USCS § 11504, shows Congress never intended § 11504 to apply in the factual situation presented in this case. Senator Prouty speaking in favor of the Conference Committee report on the floor of the Senate stated:

Nonetheless, Mr. President, the bill which you have before you, and which was agreed to in conference, is a very great step toward solving the unique tax problems of the employees of interstate common carriers and, I might add, of the carriers themselves. *While it does not limit the liability of such employees, it does limit the number of States which may require withholding from the compensation paid to an interstate carrier employee to not more than one and the number of States which may require the filing of information returns with respect to the compensation of such employee to not more than two.* (emphasis supplied)

Congressional Record – Senate, at 40313 (December 3, 1970).

- The Montana Supreme Court based its decision upon the intent of Congress and § 11504's legislative history as this Court would do if presented with the issue. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

The Petitioners further argue that Montana's subpoena is a burden on interstate commerce. Again the Petitioners fail to recognize § 11504 has no application in this situation. This Court and other state courts have held that it is not a burden on interstate commerce for a state to tax the income of nonresidents. See: *Shaffer v. Carter*,

252 U.S. 37 (1920); *Alaska Steamship Co. v. Mullaney*, 180 F.2d 805, 12 Alaska 594 (1950); *Alaska v. Petronia, et al.*, 69 Wash. 2d 460, 418 P.2d 755 (1966) cf. *Blangers v. Department of Revenue and Taxation*, ___ Idaho ___, 763 P.2d 1052 (1988) cert. den. ___ U.S. ___ (1989).

It would be a useless power for the states to be able to tax the income of a nonresident if the state cannot obtain the names of the nonresident working in their state and the amount of their income from their employers. If it's not a burden to tax the income surely it cannot be a burden to require an employer to provide the information to carry out the power to tax. In *Shaffer v. Carter*, *supra*, this Court held:

It is urged that regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say the tax is not imposed upon the gross receipts, as in *Crew Levick Co. v. Pennsylvania*, 254 U.S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *U.S. Glue Co. v. Oak Creek*, 247 U.S. 321.

Ibid., at 57.

CONCLUSION

Based upon the plain meaning of 49 USCS § 11504 the use by the Respondent's of an administrative subpoena to

obtain payroll information from the Petitioners' employer is not a violation of the Supremacy Clause. There can be no conflict with the supreme law by a state if Congress did not intend to legislate a restriction upon state action. Congress did not intend 49 USCS § 11504 to be a limitation upon the State's powers to tax railroad employees. If the exercise of the power to tax nonresidents is not a burden on commerce then neither is the exercise of the power to obtain information to carry out that power a burden. *Shaffer v. Carter*, *supra*.

DATED this 16th day of February, 1990.

Respectfully submitted,

R. BRUCE MCGINNIS

Counsel of Record

Special Assistant

Attorney General

Office of Legal Affairs

Department of Revenue

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*Attorney for Respondent,
Department of Revenue of
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APPENDIX A

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ATTORNEYS FOR INTERVENORS

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN,
INC., and BURLINGTON
NORTHERN RAILROAD
COMPANY,

Plaintiffs,

vs.

MONTANA DEPARTMENT
Of REVENUE,

Defendant.

JAMES R. ALLAN, JERRY A.

BAKER, PATRICK R.

BARTLESON, THOMAS E.

BENDER, ROBERT F.

BLANGERES, RONALD V.

BLANK, CHARLES F.

BRENNAN, DONALD D.

BUTTS, RANDY CARTWRIGHT,

CLIFFORD DAVIS, R.J.

EDGAR, MICHAEL FISK,

J.E. FLANNERY, W.P.

Cause No.

CDV-88-797

COMPLAINT OF
INTERVENORS
FOR
INJUNCTION
AND DAMAGES

FOSTER, MARVIN L. FRANZ,)
 GARY L. FRIBERG, STEVEN E.)
 GARLAND, FREDERICK E. GEST,)
 ROBERT J. GRIFFIN, WILLIAM B.)
 GRIMES, ROBERT L.)
 GROOMS PATRICK L.)
 HARRINGTON, DONALD J.)
 HEINEN, VIC A. HERRINGTON,)
 JOHN HLUBOKY, ROBERT D.)
 HOUX, DONALD C. HOWARD,)
 ROBERT K. HUGUENIN, DUANE)
 JUMP, GEORGE L. KENDALL,)
 ROBERT W. KING, JOHN A.)
 KLOMP, L. P. KNUTSON,)
 JERRY D. KOHLIEBER,)
 RICHARD P. KOHN, KENNETH)
 M. LEYDE, LARRY G. MACARTY,)
 HARRY MAIER, THOMAS A.)
 MARABELIO, E. G. MATHENA,)
 DONALD W. MAY, PATRICK J.)
 McCARTHY, JOHN H. PEBLES,)
 JACK A. PETERSON, JOE D.)
 PILIK, L. W. PINKLEY, W.G.)
 QUINTON, DONALD M. REID,)
 JOHN E. ROSSI, JAMES C.)
 SCOTT, WARREN H. SHOOP,)
 GARY R. SMITH, DONALD H.)
 STIER, MICHAEL J. STOWELL,)
 ROBERT J. STRAHL, THOMAS L.)
 TAYLOR, JAMES H. THOMSON,)
 DAVID J. WARDIAN, TIMOTHY J.)
 WATSON, JAMES H. WEAVER,)
 JEFFREY D. WEST, LOUIS F.)
 WILLIAMS, MICHAEL A.)
 WILLIAMS,)
 STEVEN M. WILSON, KEN)
 WOLKENHAUER,)
 Intervenor.)

Intervenors allege as follows:

1. Each of the above named intervenors is a resident of the State of Washington. Each of them is employed by plaintiff Burlington Northern Railroad Company, as a member of a train crew, and performs regularly assigned duties on a locomotive, car or other track-borne vehicle within three states between intervenors' home terminal at Spokane, Washington and a terminal at Whitefish, Montana.
2. The mileage traveled by each intervenor for Burlington Northern during each of the calendar years 1986 and 1987 was not more than 50% of the total mileage traveled by each intervenor while so employed during said calendar years.
3. Notwithstanding the foregoing facts, plaintiff Burlington Northern Railroad Company is unlawfully withholding income taxes for the benefit of the State of Montana from the wages of intervenors J.E. Flannery, Robert L. Grooms, John Hluboky, Donald C. Howard, Robert K. Huguenin, E.G. Mathena, Patrick J. McCarthy, Gary R. Smith, and Ken Wolkenhauer, in violation of 49 U.S. Code, section 11504.
4. Notwithstanding the foregoing facts, defendant Montana Department of Revenue is unlawfully asserting tax claims against intervenors R.J. Edgar, Michael Fisk, Marvin L. Franz, Donald J. Heinen, Duane Jump, John A. Klomp, Larry G. Macarty, Donald W. May, John H. Pebles, Jack A. Peterson, W.G. Quinton, Donald M. Reid, John E. Rossi, Gary R. Smith, Robert J. Strahl, and Michael A. Williams, in violation of the provisions of 49 U.S. Code, Section 11504.

5. Defendant Montana Department of Revenue has issued payroll garnishments against Burlington Northern, unlawfully, without due process, and without notice or opportunity for hearing, seizing payroll due to intervenors Michael Fisk, Robert W. King, Jack A. Peterson, John E. Rossi, and Gary R. Smith.

6. Intervenors are informed and believe that on August 25, 1988 defendant Montana Department of Revenue issued an administrative subpoena to Burlington Northern Railroad Company seeking payroll information which would include information regarding intervenors. The seeking and/or furnishing of said payroll information violates 49 U.S. Code, Sec. 11504. The furnishing of said information would violate the federal statutory rights of the remaining intervenors as well as those who have already been damaged by unlawful withholding, assertion of claims and garnishments as listed above.

7. The United States District Court for the Eastern District of Washington has ruled in an action in which all or most of the intervenors, Burlington Northern, and the Montana Department of Revenue were parties, that intervenors have an adequate remedy to enforce the provisions of 49 U.S. Code, Section 11504 in the state courts of Montana.

8. Intervenors will suffer irreparable harm if the administrative subpoena is enforced, and if the tax claims of the Montana Department of Revenue continue to be asserted and unlawfully collected as above alleged. Intervenors have no adequate remedy at law to prohibit further violations of their rights, and injunctions are necessary to enforce the same.

9. The named intervenors have sustained monetary damages from unlawful withholding of taxes from their wages, unlawful assertions of tax claims and wage garnishments, in sums to be proved at trial.

WHEREFORE Intervenor's pray judgment as follows:

1. A permanent injunction enjoining plaintiffs Burlington Northern, Inc. and Burlington Northern Railroad Company from furnishing to defendant Montana Department of Revenue any payroll information regarding earnings of the intervenors for 1986 and 1987, and for any future years in which intervenors travel no more than 50% of their mileage within the State of Washington.

2. A permanent injunction enjoining the Montana Department of Revenue from subpoenaing payroll information of any of the intervenors for the calendar year 1986 and 1987 and any future years in which they travel no more than 50% of their mileage within the State of Montana.

3. Judgment against plaintiffs Burlington Northern, Inc. and Burlington Northern Railroad Company for damages sustained by the intervenors whose wages have been unlawfully withheld in violation of 49 U.S. Code, Section 11504.

4. Judgment against Montana Department of Revenue for damages sustained by the intervenors whose wages were garnished without notice of an opportunity to be heard in violation of due process of law.

5. Award of reasonable attorney's fee and costs.

6. Such other and further relief as may be proper.

DATED: October 18, 1988.

POWELL & MORRIS, P.S.

/s/

William J. Powell

/s/

Larry Elison

1101 Greenough Dr., Suite B-8
Missoula, MT 59802

ATTORNEYS FOR
INTERVENORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____
day of ___, 1988 a true and correct copy of the
foregoing was served on counsel of record in
person at the following address:

Stanley T. Kaleczyc
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
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/s/

APPENDIX B

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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN,)	
INC. and BURLINGTON)	
NORTHERN RAILROAD)	
COMPANY,)	
Plaintiff,	)	Cause No.
	)	BDV-88-797
- vs -)	
MONTANA DEPARTMENT)	
OF REVENUE,)	
Defendant.)	

* * *

AFFIDAVIT OF DAVE OLSEN

DAVE OLSEN, being first duly sworn deposes and says that:

1. He is of lawful age and a resident of Lewis and Clark County Montana.
2. He is employed by the State of Montana, Department of Revenue as the Supervisor of the Compliance Section of the Income Tax Division.

3. As a part of his duties in that position he is to enforce the tax laws of Montana as they apply to nonresidents who have a source of income in Montana.

4. To perform those duties with respect to nonresident employees of the Burlington Northern Railroad Company it is necessary for him to have the names of Employees, the employees BNRR number, address, social security number, state of residence, an itemized listing of all the states in which the employee worked during a year, the wages earned by the employee in each state, and the amount withheld by BNRR in each state.

5. The information referred to in paragraph 4 can be found in BNRR documents specifically Pay Report 830A.

6. The Department has directed a administrative subpoena to BNRR to obtain this information.

7. The information requested in the subpoena is needed by the Compliance Section to:

(a) Identify individuals who have earned income within the State of Montana;

(b) To verify wages reported by BNRR employees on tax returns voluntarily filed; and,

(c) Estimate tax liabilities of BNRR employees who earned income in Montana but refuse to voluntarily file a tax return.

8. The last Pay Report 830A which the Department received dealt with wages earned in 1981.

9. The Department has repeatedly asked for reports covering subsequent years.

10. The information contained on BNRR Pay Report 830A (total wages earned in all states), as opposed to the information contained on BNRR Pay Report 830C (total wages earned in Montana), is of more use to the Department when computing an individual employees tax liability. With the additional information on Pay Report 830A (total federal wages), the Department can allow the taxpayer credit for a prorated personal exemption. Without the total income figure, a non-resident taxpayer can not be given credit for a personal exemption when an estimate is made.

11. If the BNRR is not required to provide the subpoenaed information, the Department would have limited means available to identify the nonresidents subject to tax. The Department could not ensure that BNRR employees filed the required tax returns. In the event they did not file, the Department could not verify that the correct taxable income was reported. In both cases, the net result would be a loss of revenue to the state.

12. The only alternative method of obtaining the wage information requested in the subpoena would be to audit BNRR annually to ensure they are in compliance with 40 USCS § 11504. BNRR would be required to show that they are reporting all individuals to Montana that earn more than 50% of their income in this state. To do so, the records of the individuals earning less than 50% of their income in Montana would have to be made available.

Further affiant sayeth not.

DATED this ____ day of October, 1988.

/s/ _____

State of Montana

) ss.

County of Lewis and Clark

)

On this ____ day of ___, 1988, before me a Notary Public for the State of Montana, personally appeared DAVE OLSEN, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

/s/ _____

Notary Public for the
State of Montana

Residing at _____

My Commission Expires: _____

SEAL

APPENDIX C

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 Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT, STATE OF
 MONTANA

BURLINGTON NORTHERN,)	
INC., and BURLINGTON)	
NORTHERN RAILROAD	)	Cause No.
COMPANY,	)	BDV 88-797
)	
Plaintiffs,	)	AFFIDAVIT OF
v.	)	ERIC A.
	)	ENGBRECHT
MONTANA DEPARTMENT)	
OF REVENUE,)	
)	
Defendant.)	

* * *

STATE OF MINNESOTA)	
County of Ramsey	)	ss.
)	

I, Eric A. Engbrecht, being first duly deposed and sworn, state:

1. I am the Manager, Taxes, Tax Accounting for Burlington Northern Railroad Company ("BNRR"), to whom the administrative subpoena in the above-captioned case was directed.

2. My department maintains various payroll records and information for BNRR, including Pay Report 830C.

3. Pay Report 830C contains, *inter alia*, the amount of income received by calendar year for each railroad employee for work done in Montana, whether or not the individual employee is a resident of Montana or worked more (or less) than 50 percent of his or her time in Montana. Other information contained in that report includes the name, address and social security number of each employee, the employee's identification number issued by BNRR, the state of residence, earnings attributable to work performed in Montana as stated above, and the Montana state income tax withheld, if any.

4. Pursuant to 49 U.S.C. 11504, BNRR withholds Montana state income tax from each employee who earns more than 50 percent of his or her income from work done in Montana. In addition, if an employee who is a Montana resident does not earn more than 50 percent of his or her income from any one state other than Montana, then BNRR withholds Montana state income tax from that employee as well. Thus, there are five possible scenarios to determine which BNRR employees are subject to Montana state income tax withholding pursuant to 49 U.S.C. 11504, which are depicted by the following table:

Employee's State of Residence	More than 50% Income Earned in Montana	More than 50% Income Earned in Another State	Montana Withholding
Montana	Yes	No	Yes
Montana	No	Yes	No
Montana	No	No	Yes
Not Montana	Yes	No	Yes
Not Montana	No	Yes	No

5. Utilizing this statutorily dictated method for determining when Montana state income tax should be withheld pursuant to 49 U.S.C. § 11504, in calendar year 1987, there were 632 BNRR employees from 15 states who earned a portion of their income from work done in Montana (as defined by 49 U.S.C. § 11504(a)) but for whom no Montana income tax was withheld (as provided by 49 U.S.C. § 11504(b)). Of those 632 employees, 60 were Montana residents. Thus, 572 employees from 14 states other than Montana had no Montana state income tax withheld because less than 50 percent of their income was derived from work performed in Montana, and 60 Montana residents had no Montana state income tax withheld because more than 50 percent of their income was derived from work performed in another state other than Montana. Likewise, in 1986, 709 employees from 14 states other than Montana had no Montana state income tax withheld for the same reason identified in the preceding sentence.

6. In 1987, there were 5597 employees of BNRR who earned at least some portion of their income from work performed in Montana.

7. It is the specific information about employees who are not Montana residents for whom BNRR does not withhold any amount from their income for Montana state income tax purposes pursuant to 49 U.S.C. § 11504 that the Montana Department of Revenue now seeks.

8. Further, Affiant sayeth not.

/s/ _____
Eric A. Engbrecht

Subscribed and Sworn to before me this ____ day of
____, 1988.

/s/ _____
Notary Public for the
State of Minnesota
Residing at Ramsey County -
My Commission expires ____

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of ____, 1988 a true
copy of the foregoing "Affidavit of Eric A. Engbrecht"
was personally served upon the following:

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No. 89-1181

Supreme Court, U.S.

FILED

FEB 20 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

BURLINGTON NORTHERN RAILROAD
COMPANY EMPLOYEES,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE LEGISLATIVE BOARD OF
UNITED TRANSPORTATION UNION IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI

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February 20, 1990

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BURLINGTON NORTHERN RAILROAD
COMPANY EMPLOYEES,

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v.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

**BRIEF OF AMICUS CURIAE
WASHINGTON STATE LEGISLATIVE BOARD OF
UNITED TRANSPORTATION UNION IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI**

This brief amicus curiae is filed with the written consent of the parties. The letters giving consent accompany this brief filed with the Court.

OPINION BELOW

The Supreme Court of the State of Montana issued its Opinion in this case which is reported at 781 P.2d 1121 (1989). A copy of the Montana Supreme Court's Opinion is also included in the Petition for Writ of Certiorari at

Petitioner's Appendix A-11. The *amicus curiae* cites the Petitioner's Appendix when reference is made herein to the Opinion.

INTEREST OF THE AMICUS CURIAE

The Washington Legislative Board of the United Transportation Union represents State of Washington chapters of the United Transportation Union. The office of the *amicus curiae* is located at Olympia, Washington. The Petitioners, Burlington Northern Railroad Company Employees, are members of the United Transportation Union. The Washington Legislative Board oversees and promotes the legislative interests of the Washington United Transportation Union employees.

The Petitioners are all residents of the State of Washington. State taxation of income of non-resident employees of transportation companies is of particular interest to transportation employee residents of the State of Washington, because Washington does not have an income tax. Because of the absence of a State income tax, there is no income tax credit in Washington available to resident transportation employees on account of taxes paid to another State. Any foreign State income taxes imposed on Washington transportation employees are therefore extra tax burdens. For Washington resident transportation employees who pass through several income tax States, the heavy tax burden is compounded. An additional burden is the withholding and reporting requirement imposed by multiple jurisdictions. (For a

discussion of the overall tax problems of interstate transportation employees, see S. Rep. No. 1261, 91st Cong. 2d Sess. (1970) in the Appendix hereto.)

Since 1982 the Washington resident rail transportation employees, some of whom are the Petitioners herein, have been engaged in disputes with both the States of Montana and Idaho respecting the application of State income taxes to them. The imposition of Montana and Idaho income taxes arose by virtue of their employment on transcontinental "through" freight trains which traverse both States. The Idaho dispute was resolved in 1988 in the Supreme Court of Idaho in *Blangers v. Idaho*, 763 P.2d 1052 (Ida. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).¹ The Idaho Supreme Court held that there was insufficient nexus present under either the due process clause (Amend XIV, §1) or commerce clause (Art I, §8, cl. 3) of the U.S. Constitution to subject the employees to Idaho income tax.

¹ The tax disputes have been disruptive of relations between the different States involved. The Idaho dispute with the Washington transportation employees resulted in what the media termed "a tax border war" between Washington and Idaho. The Washington and Utah legislatures because of income tax disputes with Idaho during this period over the transportation employee issue, enacted retaliatory legislation against Idaho residents. The Idaho legislature ultimately enacted Idaho Code §63-3023B which exempted transportation employees earning less than 50% of their compensation in Idaho from Idaho income taxes. If the Congressional enactment 49 U.S.C. §11504(d) had been followed, it is unlikely the States would have pursued these matters and these disruptions and the problems confronting the transportation employees would not have occurred.

Several of the Employees have brought a legal action in a Montana court² for a determination of whether they are subject to Montana income tax or whether the constitutional nexus principles followed in *Blangers* apply. When assigned to these particular transcontinental routes across Idaho and Montana, these employees board the transcontinental "through" freight trains in Spokane, Washington, and travel across Idaho to Whitefish, Montana. At Whitefish they leave the trains, which continue eastbound on a transcontinental route. After a rest period at Whitefish, as required by federal law, the employees return on westbound trains to Spokane. The employees receive their train orders from outside both the States of Idaho and Montana.

In 1970 Congress enacted Public Law 91-569, which included what is now 49 U.S.C. §11504, the statute at issue in this case. 49 U.S.C. §11504 does not deal *directly* with the taxation of interstate transportation employees. Rather, the statute limits the furnishing of income tax information and other reports by an employer to the State of an employee's residence and the State where the employee earns more than 50% of his income. The employees in this case do not earn more than 50% of their income in Montana.

The only issue in this case is whether Burlington Northern Railroad Company must furnish income tax information and other reports to the Montana Department of Revenue pertaining to non-resident transportation employees. The case does not deal with the question

² *Grooms v. Montana*, Flathead County, Montana, District Court Cause No. DV-89-242B. The hearing on this Declaratory Judgment action is still pending.

of whether the employees are taxable in Montana. However, the Montana Supreme Court in its Opinion, assumes that the employees are subject to Montana income tax because "such employees, while in Montana, enjoy the comfort and protection of Montana's civil and criminal laws, and so must share a proportionate burden of the cost of such protections". *Burlington Northern Inc. v. Montana Department of Revenue* Opinion at A-11, 12 of Petitioner's Appendix. Whether the Employees are taxable in Montana is in dispute.³ In any event the Montana taxability of the Employees is not an issue in this case. The only issue is Montana's power by subpoena or otherwise to require the employer to furnish employee tax information under the provisions of 49 U.S.C. §11504.

³ The assumption by the Montana Supreme Court that the employees are taxable in Montana, although unnecessary to the Opinion, also apparently prejudices the dispute in *Grooms*, *supra* note 2. The Montana Supreme Court Opinion ignores *Blangers* which deals with the general and constitutional taxation principles applicable to the unique situation of these workers whose employment on interstate trains takes them across Montana and Idaho. The Supreme Court of Idaho in *Blangers* held that the constitutional nexus required for imposing a State income tax involves more than providing a non-resident traveler protection and comfort while within the taxing state. A contrary holding would have meant that *any* non-resident working traveler traversing a taxing State would be subject to that State's income tax regardless of whether the traveler did any business in that State, an untenable result.

REASONS FOR GRANTING THE PETITION

- A. THE LEGISLATIVE HISTORY OF 49 U.S.C. §11504 INDICATES THAT THIS LAW WAS ENACTED TO RELIEVE THE BURDEN ON INTERSTATE COMMERCE CAUSED BY THE INCOME TAX POLICIES OF SOME STATES INsofar AS SUCH POLICIES AFFECT THE INCOME OF INTERSTATE CARRIER EMPLOYEES.

What is now 49 U.S.C. §11504(d) was enacted in 1970 and reads as follows:⁴

(d) A rail . . . private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with -

- (1) the State and subdivision of residence of the employee; and
- (2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

⁴ Between the date of its enactment in 1970 and 1978 this provision, though not in these exact words, was embodied in 49 U.S.C. §26(a). 49 U.S.C. §26(a) was recodified in its substance along with other Interstate Commerce Act provisions in 1978 in P.L. 95-473 to its present 49 U.S.C. §11504(d). It should also be noted that the House proposal to restrict income tax reporting requirements found in HR 10634 in 1970 was even more restrictive than the Senate proposal ultimately adopted by the House-Senate Conference Committee. The House, though recognizing possible tax liability to a transportation employee, would have limited income tax information reporting to the State of employee residence only. See first paragraph of quotation from Conference Report No. 91-1666, 91st Cong., 2d Sess. (1970) "Filing Information Returns" *infra* p. 7.

The Senate-House Conference Committee makes the following statement concerning what is now 49 U.S.C. §11504(d):

FILING INFORMATION RETURNS

The House bill provided that only the State of the employee's residence could require the filing of information returns for income tax purposes.

The Senate amendment provided that both the State of employee's residence and the State in which he earned more than 50% of his compensation could require the filing of information returns for income tax purposes.

The conference substitute follows the Senate amendment.

Conference Report No. 91-1666, 91st Cong. 2d Sess. (1970).

Further legislative history of 49 U.S.C. §11504 are found at S. Rep. No. 1261, 91st Cong. 2d Sess. (1970), relevant portions of which are reprinted herein. Amicus Appendix, pp. 1 to 7. S. Rep. 1261 indicates that there was an extensive legislative hearing on this legislation with testimony taken from State tax agencies, governmental transportation officials and representative of the transportation industry itself. (Amicus Appendix, pp. 3 and 4.) The burdening of interstate commerce by the income tax policies of some States necessitated the legislation. (Amicus Appendix, pp. 1 and 2.)

S. Rep. 1261 points out not only the problems of employers who must withhold tax and report payroll information for multiple States but also the State income

tax problems of transportation employees who traverse multiple States in the course of their employment:

There is no uniform taxing formula which must be applied by the States with the result that it is possible for an employee to be subjected to tax liability in a number of different states. (Amicus Appendix, p. 3.)

49 U.S.C. §11504 was enacted to benefit both the employer, burdened with administrative reporting requirements, and the employee, burdened with paying taxes and reporting income in multiple States. As evidenced by the Committee Reports, Congress was concerned with the lack of uniformity in the State practices respecting the ambulatory transportation employees, and what ultimately was enacted as 49 U.S.C. §11504(d) was the solution of Congress to multiple and inconsistent tax reporting requirements which burdened interstate commerce. Congress did not exempt interstate employees from taxation in States where they do not earn more than 50 percent of their income. Nor did Congress forbid States from taking other steps to collect taxes from non-resident workers, such as contacting the workers directly. Congress did, however, mandate in 49 U.S.C. §11504(d) that if any employee does not earn more than 50 percent of his income in any given State, income tax information shall *not* be furnished by the employer to that State unless it is the State of the employee's residence. Moreover, S. Rep. 1261 specifically indicates that a State which is neither the residence nor more than 50% earnings State of the employee (e.g. Montana in this case) *lacks the power* to require the employer to furnish employee tax information. (Amicus Appendix, p. 7.)

B. THE MONTANA SUPREME COURT DECISION VIOLATES 49 U.S.C. §11504 AND SHOULD BE SET ASIDE AS VIOLATING THE COMMERCE AND SUPREMACY CLAUSES OF THE U.S. CONSTITUTION.

This case arises from a collision between the power of the Congress under the Commerce Clause (Art. I, §8, cl. 3) to limit the manner in which States may enforce their tax laws against nonresident employees of interstate carriers and the power of the State of Montana to choose the method of enforcing its tax laws. The Supremacy Clause (Art. VI, cl. 2) requires that the laws of Montana yield to laws enacted by Congress. *Gibbons v. Ogden*, 22 U.S. 186, 9 Wheat. 186, 6 L.Ed. 23 (1824). Congress did not merely suggest in 49 U.S.C. §11504(d) that the payroll information under the circumstances of this case not be furnished; it prohibited it.

The decision of the Montana Supreme Court asserts an unfettered power by the State of Montana to require the furnishing of earnings information of non-resident employees of interstate carriers:

Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresident employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce.

Burlington Northern, Inc. v. Montana Department of Revenue, Opinion at p. A-11 of Petitioner's Appendix. The Opinion is a direct challenge upon the authority of Congress to

limit the manner in which States may enforce their taxation statutes against nonresidents.

That Congress intended to exercise its power under the Commerce Clause is illustrated by the legislative history of 49 U.S.C. §11504. Contrast the following statement from S. Rep. No. 1261 with the quotation immediately above from the Opinion of the Montana Supreme Court in this case:

The Senate Commerce Committee in favorably reporting this legislation determined that interstate commerce is unreasonably burdened by certain income taxation policies of some States insofar as such policies affect interstate carrier employee's income.

S. Rep. No. 1261, 91st Cong., 2d Sess. (1970). (Amicus Appendix, pp. 1 and 2.)

There cannot be two more diametrically opposed perspectives than that of the Congress which views some taxation reporting requirements imposed by States upon non-resident interstate carrier employee's income as an unreasonable burden upon interstate commerce, and that of the State of Montana which views the mandatory furnishing of tax information from such employees as not being an unreasonable burden. However, Congress expressly exercised its power under the Commerce Clause by enacting 49 U.S.C. §11504, resulting, therefore, in a direct conflict between the application of an otherwise valid Montana enactment and federal law, which conflict must be resolved in favor of the federal enactment. *Hamm v. Rock Hill*, 397 U.S. 306, 311-312, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964).

C. EVEN ABSENT CONGRESSIONAL ACTION, THE MONTANA INCOME TAX INFORMATION REQUIREMENTS AND UNDERLYING TAX VIOLATE THE COMMERCE AND SUPREMACY CLAUSES.

State legislative authority to burden interstate commerce is narrowly circumscribed by the dormant commerce clause,¹ which grants to Congress plenary power over it. Cf. *Amerada Hess v. New Jersey*, 490 U.S. ___, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). Thus even before Congress takes specific action with respect to State tax or regulatory requirements, States lack the authority to enact laws which unduly burden interstate commerce. *Id.*; see generally Rowland and Vaché, *Taxing a Moving Target*, 22 Idaho L.Rev. 343 (1986).

In this case, both reporting requirements and the underlying State income tax would be preempted by the effect, in each case, of unduly burdening interstate commerce, even absent Congressional action. In 1970, the Senate Commerce Committee concluded, after extensive hearings, that the withholding and payroll reporting State tax problems faced by *both* employers and employees unreasonably burden interstate commerce. S. Rep. No. 1261, 91st Cong. 2d Sess. (1970); Rowland and Vaché, *supra*, 22 Idaho L.Rev. at 375. The Idaho Supreme Court agreed in *Blangers v. Idaho*, 763 P.2d 1052 (Ida. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

But this is *not* a case involving Congressional inaction. Congress has very clearly spoken in 49 U.S.C. §11504, and this Court has repeatedly stated that conflicting State laws must give way to Congressional action. E.g., *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 19 L.Ed. 387

(1869); *Jones v. Rath Packing Co.*, 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); cf. *Amerada Hess, supra*.

Respondent herein may argue that Montana's tax and reporting requirements do not "conflict" with 49 U.S.C. §11504. However, the construction given 49 U.S.C. §11504 by Montana is wide of the mark and such construction only avoids conflict with §11504 by rendering the provisions of §11504 completely ineffective and meaningless. This Court has repeatedly stated that courts are obliged to give effect to every word Congress used, and every part of a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 60 L.Ed.2d 931, 99 S.Ct. 2326 (1979); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 86 L.Ed.2d 168, 105 S.Ct. 2587 (1985).

If we give effect to every part of 49 U.S.C. §11504, we see that Congress prohibited States from collecting income tax information from employers regarding non-resident interstate carrier employees not earning more than half their income in such States. Petitioners fit squarely within this class. Yet Montana insists that it is free to collect such withholding information from Petitioner's employer and that so doing does not conflict with 49 U.S.C. §11504.

Such an anomalous result should not be tolerated. This Court should accept review of the instant case, and reverse.



CONCLUSION

This case presents the singular and concise question of the supremacy of Congress in regulating interstate commerce in enacting an important federal statute. The Montana decision nullifies in Montana the federal statute 49 U.S.C. §11504(d). The Montana decision unless reversed may also serve as a precedent in other States for the ignoring of the federal law. For the reasons set forth above the *amicus curiae* requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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February 20, 1990

APPENDIX

**INCOME TAXATION - INTERSTATE
CARRIERS AND EMPLOYEES**

House Report (Interstate and
Foreign Commerce Committee)
No. 91-1195, June 15, 1970 [To accompany H.R. 10634]

Senate Report (Commerce Committee) No. 91-1261,
Oct. 1, 1970 [To accompany H.R. 10634]

Conference Report No. 91-1666, Dec. 3, 1970
[To accompany H.R. 10634]

Cong. Record Vol. 116 (1970)

DATES OF CONSIDERATION AND PASSAGE

House September 14, December 8, 1970

Senate October 12, December 8, 1970

The Senate Report and the Conference Report are set out.

SENATE REPORT NO. 91-1261

The Committee on Commerce, to which was referred the bill (H.R. 10634) to amend the Interstate Commerce Act and the Federal Aviation Act of 1958 in order to exempt certain wages and salaries of employees from withholding for income tax purposes under the laws of States or subdivisions thereof other than the State or subdivision of the employee's residence, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

BACKGROUND AND NEED SECTION

The Senate Commerce Committee in favorably reporting this legislation determined that interstate

commerce is unreasonably burdened by certain income taxation policies of some States insofar as such policies affect interstate carrier employee's income.

The problem addressed by this legislation is peculiar to those employees who are required by the nature of their employment to work in more than one State on a regular basis. Tax policies in some States have created great hardships both for interstate carriers and interstate carrier employees. Certain States have insisted upon withholding from employees an amount based upon the employee's entire annual income even though the portion of the employee's income derived from performance of duties within the State in question may have represented a very small proportion of his total income. In many instances this has meant that some employees were deprived of a substantial amount of their income throughout the year. It is no answer that at the end of the year a good portion of that money might be returned to the employee.

The employer is also confronted with serious problems. State withholding provisions typically require that the employer determine the amount of income earned by an employee in a particular State and that the employer take care of all other administrative details that are related to withholding. Some States which do not require withholding nonetheless require the employer to file periodic information returns. Where several States and numerous employees are involved, the administrative load can be extremely onerous for the employer.

However, withholding and the requirement of filing information returns with all of the jurisdictions asserting

a right to tax any portion of the compensation of the employee are not the only problems. For the employee multiple State tax liability is itself a burden. There is no uniform taxing formula which must be applied by the States with the result that it is possible for an employee to be subjected to tax liability in a number of different States.

In hearings before the committee, numerous witnesses, representing all manner of viewpoints on the issues, appeared or provided statements for the hearing record. Included among those who testified were representatives of the Interstate Commerce Tax Reform Committee (a group formed by certain members of the International Brotherhood of Teamsters; Flight Engineers International Association; Marine Firemen's Union of the SIU; Sailor's Union of the Pacific, SIU; National Engineer's Beneficial Association; the Airline Pilots Association, and the Marine, Cooks, & Stewards of the Seafarer's International Union); the Brotherhood of Locomotive Engineers; Association of American Railroads; Western Highway Institute; National Association of Motor Bus Owners; Congress of Railway Unions; Multistate Tax Commission; Flight Engineers' International Association, AFL-CIO; American Trucking Associations, Inc; Air Lines Pilots Association; Greyhound Lines; Department of Revenue for the State of Arkansas; National Association of Tax Administrators; Tax Commissioner for the State of North Dakota; New York State Department of Taxation and Finance; Bureau of Revenue for the State of New Mexico; State of Nebraska, Income Tax Division; Department of Revenue for the State of Iowa; Director of Revenue State of Illinois; Income Tax Division, State of

Alabama; State Tax Commission, State of Nebraska; Department of Revenue, State of Alaska; Department of Revenue, State of Washington; and Air Transport Association.

The hearing record provides several examples of the difficulty. One trucking company provided the committee with information showing that it had numerous drivers who worked in several different States. For example, 342 of its drivers drove in 19 different States, 397 of its drivers drove in 11 States and hundreds of additional drivers for just this one company worked regularly in five or more States. If the majority of those States taxed the income of the driver, it can readily be seen that the employer and the employee would be faced with a monumental task of first of all determining tax liability and secondly complying with the individual tax laws of every one of those States. Some of the difficulties created by multiple State taxation were set forth in the hearings. For example the following assertions were made:

(1) Proper withholding for nonresident employees requires complete knowledge of what are often numerous and often complicated State laws, rules and regulations.

(2) Determination of the exact amount to be withheld is very difficult, due to lack of uniformity among the State withholding laws.

(3) Payroll procedures, even though in many instances computerized, are subject to continuous change because the routes traversed by an individual driver or airline pilot vary from State to State and in the case of airlines probably vary on each flight. —

(4) The cost of administering the nonresident withholding requirements is extensive.

(5) In the majority of instances, cost of administration exceeds the amount of tax withheld and transmitted to the State.

One of the more burdensome problems is confronted by airline pilots who in the course of a few hours of employment might fly over several different States. And these pilots for the same general route may fly over different States for different periods of time each time that same route is flown.

To be sure, not all States impose net income taxes on individuals. But at the present time 38 States do impose such a tax. All of those States require withholding on the full amount earned by residents and 31 of those States require withholding on amounts earned by residents and nonresidents within their borders. In addition, numerous cities impose income taxes and require withholding as to both residents and nonresidents.

The original version of S. 2044 and H.R. 10634 related solely to the withholding and reporting problems. Each State except the State of residence would have been precluded from requiring reporting or withholding for tax purposes from the wages of interstate carrier employees.

It became apparent in the course of the committee's hearings and later deliberations on the problems confronting interstate carrier employees that elimination of multiple withholding was only a partial answer and, in fact, could place the employee in greater jeopardy than he would have been had the bill not been passed. This is true because the elimination of a State's power to require

withholding has no bearing on the State power to tax. So it could easily happen that an employee would find himself at the end of the year with tax liability in several States but with an inadequate amount of money withheld and consequently a very serious and unexpected financial burden. Indeed, it has come to the Committee's attention since the hearings that certain railroad employees and others are being required to file information returns prior to the taxing date. On the other hand, the hearing record includes testimony expressing concern that a bill confined to limiting withholding and the filing of information returns to the State of an interstate carrier's employee's residence, as originally contemplated, might induce non-resident interstate carrier employees to evade non-resident State income taxes which might properly be due.

The Committee concluded, therefore, that legislation in this area would be incomplete if it did not address the very basic problem of multiple State tax liability along with the problem of multistate withholding and/or reporting for taxation purposes.

SUMMARY OF BILL

The amended bill does three basic things:

- (1) Limits power to tax income of interstate carrier employees to the employee's State of residence *and* any State in which he earns more than 50 per centum of the compensation paid to him by such employer;

- (2) Limits power to require withholding for tax purposes from income of interstate carrier employees to

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either the State in which such employee earned more than 50 per centum of the compensation paid to him by such carrier during the preceding calendar year *or* the State of residence;

(3) Limits the power to require the filing of information returns to the State of residence *and* the State by which withholding may be required.

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